UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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EDWIN J. PAPETTI,

Plaintiff

-against-

COMPAGNIE NATIONALE AIR FRANCE,

Defendant.

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97 CV 2921

MEMORANDUM
AND
ORDER

ROSEN, LEFF
(Robert M. Rosen, of counsel)
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P.O. Box 2360
Hempstead, New York 11550
for plaintiff.

THELEN REID & PRIEST LLP
(Charles H. Kaplan, of counsel)
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for defendant.

NICKERSON, District Judge:

Plaintiff brought this action under 42 U.S.C. §§ 12101, et seq., the Americans with Disabilities Act, alleging wrongful termination, failure to make accommodations for his work-related disability, harassment, and various state law claims. Plaintiff

has submitted some of these claims to arbitration. Defendant moves to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b) or, in the alternative, to stay the action under the Federal Arbitration Act, 9 U.S.C. § 3, pending plaintiff's arbitration.

I

Plaintiff's complaint alleges the following facts. Plaintiff worked as an air cargo agent for defendant from August 1973 through September 1995 moving freight to carriers bound for various destinations around the world. Due to the exposure to severe dust pollution and asbestos in Kennedy Airport's Cargo Bay 83 where he worked, plaintiff developed bilateral plueral plaques, respiratory infections, bronchitis, shortness of breath, and difficulty in breathing. Dr. Joseph Falco plaintiff's doctor, prescribed a respirator to be used while plaintiff was in the cargo area. Dr. Falco asked defendant to issue a respirator to plaintiff. Defendant failed to do so, and plaintiff had to

purchase the respirator at his own expense.

Fellow employees and supervisory personnel ridiculed and teased plaintiff commenting that his respirator looked like a gas mask, and called him names such as "Darth Vader" and "Goofey" (sic). Plaintiff says that although he made requests for a transfer to the passenger terminal to accommodate his disability, the requests were met with hostility, ridicule, and denied without reason. He says that his absenteeism and ultimate firing are a direct result of his disability and defendant's failure to accommodate him.

On March 30, 1994 defendant fired plaintiff for excessive absenteeism and unacceptable performance. Plaintiff then demanded arbitration in accordance with defendant's grievance procedures contained in its February 1, 1994 Cargo Agent Rules. On August 24, 1994 an arbitrator found that although plaintiff's absences were unacceptable, his 21 years of employment with defendant served as a mitigating factor. The arbitrator reinstated plaintiff's employment, and gave

him a final opportunity to meet the time and attendance standards.

Plaintiff went back to his job in September 1994 and remained with defendant until his second and last firing on September 19, 1995. According to defendant, plaintiff continued his pattern of excessive absenteeism.

Plaintiff demanded arbitration of his second termination pursuant to defendant's grievance procedure contained in its new July 10, 1995 Cargo Service Agent's Rules. Defendant opposed the demand for arbitration arguing that plaintiff's first arbitration hearing was final. Plaintiff then moved for an order compelling arbitration.

On June 12, 1996 the New York Supreme Court, Suffolk County, granted plaintiff's petition to compel arbitration. The court found that the arbitrator in the first decision did not address the medical issues raised by plaintiff in defense of his absenteeism. The court held that, "the issues of whether Papetti's

absenteeism were (sic) excusable because of a bona fide medical condition and whether the employer's refusal to provide a respirator and to correct a possible dangerous condition have never been litigated in any forum." Plaintiff filed a complaint in this court while the arbitration was pending.

II

Plaintiff says that since the grievance procedure, which is part of the Cargo Service Agent's Rules, was part of a collective bargaining agreement, his claims brought under the Act should not be dismissed. See Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). But plaintiff voluntarily chose to arbitrate his statutory claims.

An action may be commenced in federal court to enforce rights under the Americans with Disabilities Act. See 42 U.S.C. § 12117(a). But an alternative means of dispute resolution such as arbitration is encouraged. Id. at § 12212.

In this case plaintiff sought and compelled arbitration of his claims under the voluntary grievance-arbitration procedure contained in defendant's July 10, 1995 Cargo Service Agent's Rules. He was not compelled to do so under the rules.

The arbitrator for the second arbitration hearing framed the issues to be decided as follows: "(1) Did the Company have just cause to discharge Edwin J. Papetti? If not, what shall be the remedy?, (2) Was Mr. Papetti's absenteeism excusable because of a bona fide medical condition?, and (3) Did the Company fail to accommodate Mr. Papetti's medical conditions and were those medica_ conditions work related?"

Plaintiff voluntary chose to invoke the arbitration process, and petitioned the Supreme Court, Suffolk County, to compel arbitration of these claims. Since the arbitrator will decide these issues, plaintiff's claims of wrongful discharge and failure to accommodate his disability are dismissed with prejudice.

Plaintiff also brought a claim under the Americans with Disabilities Act for harassment. This issue is not before the arbitrator. Where an employee is harassed because of a disability he can make a cognizable claim under the Americans with Disabilities Act. See Hendler v. Intelecom USA, Inc., 963 F. Supp. 200, 208 (E.D.N.Y. 1997). Defendant moves to dismiss or alternatively stay the claim.

The Federal Arbitration Act provides that any suit or proceeding brought in a court of the United States upon any issue that is referable to arbitration under an agreement, shall be stayed until the arbitration is completed under its terms. See 9 U.S.C. § 3. But the Federal Arbitration Act does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Id. at § 1. The Federal Arbitration Act's exclusion under Section 1 applies to employees working in the transportation industry. See Powers v. Fox Television Stations, Inc., 923 F. Supp. 21, 23

(S.D.N.Y. 1996); see also Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972).

Plaintiff worked as a air cargo agent physically moving freight, which eventually made its way to various destinations throughout the United States and the world including Chicago, Miami, Houston, Boston, Los Angeles, France, Saudi Arabia, India, and Africa. Even if the Federal Arbitration Act applies to the harassment claim, plaintiff is exempt under the Section 1 exclusion.

Defendant's motion is granted in part and denied in part. The claims of failure to accommodate and wrongful termination are dismissed with prejudice. The claim of harassment survives.

So ordered.

Dated: Brooklyn, New York
August [illegible], 1998

Eugene H. Nickerson, U.S.D.J.